BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT D. LEROY	)	
Claimant	)	
VS.	)	
	)	Docket No. 204,000
ASH GROVE CEMENT COMPANY	)	
Respondent	)	
Self-insured	)	

ORDER

Claimant appealed Administrative Law Judge Jon L. Frobish's January 10, 2001, Award. The Appeals Board heard oral argument on June 20, 2001.

APPEARANCES

Claimant appeared by his attorney, Edwin H. Bideau, III of Chanute, Kansas. The self-insured respondent appeared by its attorney, Frederick J. Greenbaum of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Derek R. Chappell of Ottawa, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Award. Additionally, at oral argument, the respondent requested that the record for a previous claim, Docket No. 131,196, also be made part of the record of this docketed claim. The Administrative Law Judge (ALJ) did not list the record of Docket No. 131,196 as part of the record in this claim. But the transcript of the June 14, 2000, Regular Hearing contains a request by the respondent for the ALJ to take judicial notice of the record contained in Docket Number 131,196 and the claimant did not object to this request. The Board, therefore, has included the record contained in Docket No. 131,196 as part of the record on appeal for this docketed claim.

ISSUES

This is a claim for bilateral shoulder injuries claimant suffered while performing his regular work activities for the respondent from September 21, 1990 through the present. The last time claimant testified in this matter was by deposition on November 10, 2000. At that time, claimant remained employed by the respondent as a rock truck driver.

In a previous claim, Docket No. 131,196, claimant received a 20 percent permanent partial general disability award based on permanent functional impairment for bilateral shoulder injuries with a May 27, 1986, accident date while likewise employed by the

respondent. In that case, the ALJ, in a September 21, 1990, Award found claimant had proven a work disability and awarded claimant a 64 percent permanent partial general disability. But the respondent appealed that award to the district court. On appeal, the district court found claimant had not proven a work disability and awarded claimant a 20 percent permanent partial general disability based on permanent functional impairment. The district court's opinion was affirmed by the Kansas Court of Appeals in a not designated for publication opinion filed October 2, 1992, Docket No. 67,918.

The claim, which is the subject of this appeal, was filed July 25, 1995. In the January 10, 2001, Award, the ALJ denied claimant workers compensation benefits concluding that claimant had failed to prove that either his need for medical treatment or any increase in disability was the result of a new accident. But instead, the ALJ found the medical treatment needed and any increase in disability, was the natural progression of the previous work-related injuries found in Docket No. 131,196.

On appeal, claimant contends he proved through his testimony and the testimony of William L. Dillon, M.D. and Edward J. Prostic, M.D. that his need for medical treatment and any increased disability was a result of a series of new accidents caused by his each and every day repetitive work activities. Thus, claimant contends he is entitled to an award of temporary total disability, increased permanent partial general disability, and future medical compensation for a permanent aggravation of a preexisting bilateral shoulder condition.

The respondent contends the ALJ's Award should be affirmed. Respondent argues that claimant's need for medical treatment was only related to his right shoulder and that need was not the result of a new accident but was a natural progression of the previous right shoulder injury found in Docket No. 131,196. In the alternative, if a new accident is found, respondent argues claimant failed to prove he suffered any increased permanent partial general disability as a result of the new accident over and above the 20 percent permanent partial general disability that claimant was awarded in Docket No. 131,196.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

On the beginning date of claimant's previous accident, May 27, 1986, claimant injured his right shoulder while operating a large bulldozer at respondent's quarry. Claimant received conservative medical treatment for a sore right shoulder. Claimant returned to work and suffered an injury to his left shoulder by overusing his left arm to compensate for the injured right shoulder.

Respondent eventually provided medical treatment for claimant's bilateral shoulder injuries through orthopedic surgeon Roger W. Hood, M.D. Claimant first saw Dr. Hood on September 26, 1988. After examining claimant, Dr. Hood diagnosed claimant with impingement syndrome of both shoulders more on the left than the right. On December 1, 1988, Dr. Hood performed an acromioplasty on claimant's left shoulder. This surgical procedure consisted of partial removal of the bone on the underneath section of the front of the acromion. This allowed movement of the shoulder and rotator cuff without impingement. Based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (AMA Guides, Third Edition), and claimant's consistent complaints, Dr. Hood found claimant had a range of motion loss of abduction in both of claimant's shoulders resulting in a 5 percent permanent functional impairment to each upper extremity. Pursuant to the AMA Guides, Third Edition, Dr. Hood converted the 5 percent upper extremity ratings to 3 percent whole body ratings and combined those according to the Combined Values Chart resulting in a 6 percent whole body permanent functional impairment.

Dr. Hood restricted claimant from repetitive overhead use of his arms with activities requiring strength and forceful movements. No restrictions were placed on activities below shoulder level. At that time, Dr. Hood did not believe claimant's symptoms on the right were at a level where surgery was needed to decompress the right shoulder. But Dr. Hood went on to opine that if the right shoulder symptoms increased, he would recommend the same surgical procedure be done on the right side.

By the time claimant saw Dr. Hood on September 26, 1988, he had elected to bid off the strenuous bulldozer job because of the pain and discomfort in his bilateral shoulders to an easier, but still repetitive, truck driving job. The truck driving job required claimant to drive a large 58 ton Caterpillar dump truck. The truck measures some 15 feet in height with tires measuring over 7 feet in diameter. Claimant transferred to the truck driving job on July 13, 1987.

But even after the transfer to the truck driving job, claimant testified that both of his shoulders worsened because of the rough roads he had to drive over and the repetitive forceful gripping required to operate and steer the heavy dump truck. Although the dump truck is equipped with power steering, the steering wheel measures some 18 to 20 inches in diameter and is much harder to steer than a normal truck. Additionally, claimant is required to turn and back up the truck at the quarry for loading material and has to turn and back up the truck to unload the material at the crusher. The truck is driven constantly over an eight hour work day on rough roads between the crusher and the quarry and back again for a distance of some 4.4 miles.

On June 1, 1993, because of continuing inflamation and soreness in his shoulders, claimant was seen by orthopedic surgeon William L. Dillon, M.D. Claimant provided Dr. Dillon with a history of impingement syndrome in both shoulders since 1986, with an

acromioplasty performed on claimant's left shoulder in 1988. At the time that claimant saw Dr. Dillon, he had more severe symptoms on the right than on the left. Dr. Dillon treated claimant's right shoulder with an injection.

Claimant returned to see Dr. Dillon on January 19, 1995. He had gotten some three months of pain relief in the right shoulder from the 1993 injection. At this visit, however, claimant had increasing pain and popping in the right shoulder. After examining claimant, Dr. Dillon decided to proceed with acromioplasty on the right. Dr. Dillon's diagnosis was impingement syndrome of the right shoulder and degenerative disease of the right acromion clavicular joint. On March 27, 1995, claimant underwent an acromioplasty of the right shoulder. Dr. Dillon took claimant off work from March 24, 1995, to May 15, 1995.

The last time Dr. Dillon saw claimant was on March 21, 1996. Based on the AMA Guides, Fourth Edition, Dr. Dillon rated claimant's permanent functional impairment at 5 percent whole body to each shoulder or 10 percent whole body functional impairment for both shoulders. The 5 percent rating for the left shoulder was based on the May 27, 1986, injury and subsequent 1988 surgical procedure. Dr. Dillon commented that rating procedures had changed from the 1980s to the present. In the 1980s, he along with other physicians were rating higher than they are currently.

Dr. Dillon opined that claimant's truck driving duties while employed by the respondent that consisted of constantly having to grip the steering wheel, steering back and forth eight hours per day along with being bounced around caused soreness in claimant's right shoulder and caused aggravation to claimant's preexisting impingement condition. Dr. Dillon went on to opine that the reason claimant's right shoulder required surgery in 1995 was because claimant's truck driving activities aggravated his preexisting right shoulder condition and made it worse.

After Dr. Dillon last saw claimant on March 21, 1996, claimant missed months of work because of various personal health problems not associated with his shoulder injuries. In February 1996, claimant was off work for an infection. Two months later in 1996, claimant was hospitalized for kidney stones. Claimant was off work for a year in part of 1996 and in part of 1997 because of hepatitis C. In 1998, claimant missed four months of work with an enlarged liver condition.

When claimant finally returned to full time work as a truck driver and also repairing machinery during the winter shut down, claimant testified, "It liked to killed me." Claimant also testified that when he returned to work he was deconditioned because of the long absences as a result of his personal health problems which made his symptoms in both shoulders worsen. In fact, during the winter shut down period in 1998, claimant had to take a week of vacation in the middle of the shut down period because his shoulders hurt so bad that he could not perform the heavy work required to repair the impactor and rock crusher.

At claimant's attorney's request, orthopedic surgeon Dr. Edward J. Prostic saw claimant twice in regard to his May 27, 1986, bilateral shoulder injuries and also saw claimant twice for the aggravation of his bilateral shoulder injuries from a series of accidents starting September 21, 1990 and continuing.

The last time Dr. Prostic saw claimant was on June 30, 2000. After conducting a physical examination of the claimant, Dr. Prostic opined that claimant's employment activities from September 21, 1990, through the present had caused repeated minor trauma to both of the claimant's shoulders. Utilizing the AMA Guides, Fourth Edition, Dr. Prostic assessed claimant's right upper extremity at the shoulder level with a 25 percent permanent functional impairment and the left upper extremity at the shoulder level with a 30 percent permanent functional impairment. Dr. Prostic then converted those ratings to whole body ratings and combined those for a 30 percent functional impairment.

At the time Dr. Prostic saw claimant in 1989 for the May 27, 1986 shoulder injuries, he also assessed claimant with a 30 percent whole body permanent functional impairment. But for a May 27, 1986 accident, the workers compensation act did not require functional impairment to be established based on the AMA Guides.[1] At that time, functional impairment was only required to be established by competent medical evidence, while now functional impairment also has to be established utilizing the AMA Guides, Fourth Edition.[2] Dr. Prostic testified that because the AMA Guides was not required in 1989, he then based his rating opinions on his personal experience and not the AMA Guides.

Dr. Prostic also testified, that if he had used the AMA Guides, Fourth Edition, in 1989, to establish claimant's permanent functional impairment, as a result of his bilateral shoulder injuries, he would have assessed claimant with a 5 to 10 percent functional impairment of each upper extremity at the shoulder level. As previously noted, Dr. Prostic's current assessment utilizing the AMA Guides, Fourth Edition is 25 percent on the right and 30 percent on the left. Thus, Dr. Prostic, utilizing the same basis of assessing functional impairment, has established an increase in claimant's functional impairment as compared to the amount of functional impairment that would have been assessed according to the AMA Guides, Fourth Edition in 1989.

During Dr. Prostic's deposition testimony, he discussed the use of the AMA Guides in establishing permanent functional impairment. During that discussion, Dr. Prostic emphasized that the AMA Guides should be consulted but in the end the rating should be the doctor's own opinion based on his own knowledge and experience. But nevertheless

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[1] *See* K.S.A. 44-510e(a) (Ensley 1986) and Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 196, 558 P.2d 146 (1976) (holding that, even if work disability is not proved, claimant is entitled to recover for functional impairment).

[2] *See* K.S.A. 1999 Supp. 44-510e(a).

when Dr. Prostic presently establishes functional impairment for an injury covered under the Kansas Workers Compensation Act he uses the AMA Guides, Fourth Edition, to the extent possible.

Dr. Prostic was further asked whether claimant's bilateral shoulder conditions that he presently experiences were the same conditions he was treated for in 1989. Dr. Prostic answered, "Well, I think it's a repetitious trauma that started back then and is continuing." Dr. Prostic also answered, "Yes" to the question of whether claimant's work he performed the last 4 or 5 years before he examined claimant on June 30, 2000, made both of claimant's shoulders worse.

Injury to a worker caused by performing his usual work tasks may constitute an accident within the meaning of the workers compensation act.[3] An injury is compensable when a workers' repetitive work activities aggravate or accelerate a preexisting condition.[4] Claimant's testimony alone is sufficient evidence to establish claimant's physical condition.[5]

Thus, the Board concludes claimant's continuing work activities aggravated claimant's previous right and left shoulder condition resulting in a new accident causing worsening in both shoulders and need for surgery for the right shoulder. The Board finds that claimant's testimony coupled with the testimony of Dr. Dillon and Dr. Prostic is persuasive and support this conclusion. First, although claimant's right shoulder was symptomatic in 1989, surgery was not required until the symptoms worsened in 1995. Second, when claimant returned to work in 1998, after being off work for months for non-work-related health problems, claimant's bilateral shoulder condition then continued to worsen.

Dr. Prostic was the only physician who had the opportunity to examine claimant in 1989 after his left shoulder surgery and in 1999 and 2000 after both his right shoulder surgery and after claimant returned to work in 1998 following being off work for months for personal health problems. Thus, the Board finds Dr. Prostic's medical opinions contained in the record on claimant's permanent functional impairment are the most persuasive. Dr. Dillon last examined claimant on March 21, 1996, and his opinions, therefore, only relate to claimant's condition at that time and do not take into consideration claimant's continuing aggravation of his condition after 1996.

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[3] *See* Damars v. Ricked Manufacturing Corporation, 223 Kan. 375, 379, 573 P.2d 1036 (1978).

[4] *See* Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[5] *See* Graff v. Trans World Airlines, 267 Kan. 854, 863-64, 983 P.2d 258 (1999).

Where a work related injury causes aggravation or acceleration of a preexisting condition, compensation is allowed for the entire disability without apportionment of causation.[6] But the Kansas Workers Compensation Act now provides:

> The employee shall not be entitled to recover for aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[7]

There can only be a deduction for a preexisting disability where there is evidence of the amount of preexisting disability or impairment due to a preexisting condition.[8] Here, the Board finds Dr. Prostic's opinion established that if he would have rated claimant's bilateral shoulder injuries in 1989 based on the presently required AMA Guides, Fourth Edition, that each upper extremity at the shoulder level would have been rated at 5 to 10 percent. Now, also using the AMA Guides, Fourth Edition, Dr. Prostic assessed claimant's right shoulder with a 25 percent permanent functional impairment rating and claimant's left shoulder with a 30 percent permanent functional impairment. Thus, the Board concludes that claimant had a preexisting permanent functional impairment of 10 percent for each upper extremity which resulted in an increased functional impairment for the right shoulder of 15 percent and the left shoulder of 20 percent. Those permanent functional impairment extremity ratings convert to a 9 percent whole body rating on the right and a 12 percent whole body rating on the left[9] which combine for a 20 percent whole body functional impairment increase.[10] Thus, the Board finds that the permanent partial general disability award in this claim should be 20 percent.

Since the Board has found that claimant's bilateral shoulder condition has worsened as a result of a series of new accidents and not the natural and probable consequence of the previous May 27, 1986, accident, a problem arises, however, when attempting to affix a date to this series of new accidents. The Court of Appeals attempted to establish a bright line rule whereby in repetitive trauma cases the date of accident would be the last day worked by claimant.[11] But problems with the last worked rule soon became apparent. One of those problems was addressed when the Court of Appeals held that the date of

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[6] *See* Woodward at 514.

[7] *See* K.S.A. 1999 Supp. 44-501(c).

[8] *See* Hanson v. Logan U.S.D. 326, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000).

[9] AMA Guides, Fourth Edition, p. 20, Table 3.

[10] AMA Guides, Fourth Edition, p. 322, Combined Values Chart.

[11] See Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

accident in a repetitive trauma case when an injured worker continues to work is his last day that the injured worker performed his regular work tasks where an accommodated job was offered because of work restrictions.[12] But in this case, although claimant has met maximum medical improvement he has not left work or he has not been offered an accommodated position. Claimant continues to perform truck driving duties for respondent that aggravate his bilateral shoulder condition. Under these facts, the date of accident has yet to occur. Therefore, setting an accident date is a problem. The Board has previously addressed this problem and found the date of the regular hearing as the date of accident.[13] Here, as in Kelley, claimant continues to perform work activities that aggravate his condition "each and every working day" through the date that he testified at the regular hearing and, presumably, beyond.

The Board finds the rationale of Berry and Treaster requires finding that claimant suffered one accident and one injury and that benefits should be awarded under a single accident date which, in this case, is June 13, 2000, the last date claimant worked before the regular hearing where claimant, although he had met maximum medical, continued to perform work activities that aggravate his condition.

It must be remembered that the bright line rule first announced in Berry is intended to establish a single date of accident for the purpose of computing the award. This does not mean that the injury in fact occurred on only one date. By definition, repetitive trauma injury occurs over a period of time. The date that we are dealing with a series of accidents cannot be lost sight of when determining a single "date of accident" for legal purposes in applying the workers compensation act.

The parties stipulated that if this claim was determined compensable then claimant was off work because of the right shoulder surgery from March 24, 1995, until May 15, 1995, and claimant's average weekly wage qualified him for the maximum compensation rate.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Jon L. Frobish's January 10, 2001, Award is reversed and the Board enters an Award as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant**,** Robert D. Leroy, and against the self-insured respondent Ash Grove Cement Company, for an

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[12] *See* Treaster v.Dillon Companies, Inc., 267 Kan. 610, Syl.¶ 4, 987 P.2d 325, (1999).

[13] *See* Kelley v. Kinedyne Corp., WCAB Docket No. 233,493 (May 2000).

accidental injury which occurred June 13, 2000, and based upon the maximum compensation rate of $383.00.

Claimant is entitled to 7.57 weeks of temporary total disability compensation at the rate of $383.00 per week or $2,899.31 followed by 83 weeks of permanent partial disability compensation at the rate of $383.00 per week or $31,789.00, for a 20 percent permanent partial general disability making a total award of $34,688.31 which is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

Respondent is ordered to pay all reasonable and necessary medical expenses as authorized medical.

Claimant is entitled to an unauthorized medical allowance to the statutory maximum amount of $500.

Claimant is entitled to future medical treatment upon proper application and approval by the Director.

The Kansas Workers Compensation Fund (Fund) has no interest in this claim. The Fund only appeared because of its interest in claimant's previous injuries found in Docket No. 131,196.

All remaining orders contained in the Award are adopted by the Board.

IT IS SO ORDERED.

Dated this ____ day of March 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Edwin H. Bideau, III, Attorney for Claimant
Frederick Greenbaum, Attorney for Respondent
Derek Chappell, Attorney for Workers Compensation Fund
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director